IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

STOP H-3 ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The basic question presented by this case is whether the extraordinary protections of Section 4(f) of the Department of Transportation Act and the corresponding provisions of the Federal-Aid Highway Act apply to the Moanalua Valley, a privately owned alleged "historic site" determined to be of no state or local historic significance by the Hawaii Historic Places Review Board, and of no national significance by the Interior Department,[1] by virtue of a

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[1] The private respondents cite the opinion of an "expert" on Polynesian oral history in suggesting that the Valley should properly be considered an historic site of national significance. (Br. Op. 9) In fact, as described in the Petition, the National Park Service experts concluded that "it would not be possible . . . to professionally defend" a finding of national significance, and the Hawaii Historic Places Review Board, which is composed of historians and other experts on Hawaii, concluded that the "historical" information submitted was "insubstantia[l]," "deficien[t]" and "inaccura[te]." (Pet. 12-13).

determination by the Interior Department that the site is of local significance.

The result of the private respondents' position[2]—adopted by the Court of Appeals—is that the views of competent state and local officials and of the Hawaiian public and the U.S. Department of Transportation are ignored and the construction of a long-planned and necessary highway unreasonably delayed or halted.[3]

1. The argument of the private respondents centers on the National Historic Preservation Act ("NHPA"), a stat-

[2] The Brief for the Federal Respondents in Opposition does not express any view on the substantive issues in the case but simply suggests that the question is not likely to recur because of certain regulations of the Secretary of the Interior. The Federal respondents defended the Department of Transportation's action in the District Court and urged in the Court of Appeals—in a joint brief with the present Petitioner—that the District Court's judgment be affirmed. An explanation for the current silence as to the merits is as absent from the Federal respondents' brief as is any substantive defense of the Court of Appeals' majority opinion. Clearly there is no attempt to defend the decision on its merits. As to the likelihood of recurrence, see part 3, p. 8, below. Since the Federal respondents offer no substantive support for the Court of Appeals' judgment, the remainder of this Reply Brief (except part 3) will discuss the attempt by the private respondents to uphold that judgment.

[3] The private respondents incorrectly claim that TH-3 is actually opposed by the Hawaiian public. (Br. Op. 7-8). In fact, the contrary is true. As previously described, the highway was planned in its present location in response to strong public sentiment. (Pet. 9-10). Moreover, recent surveys show strong continuing support from the public for completion of the highway. *E.g.*, Honolulu Advertiser, p. 1, col. 1 (May 18, 1976). The private respondents also claim that the highway is not consistent with Honolulu's planned development; was not derived from the 1964 Oahu General Plan; and that, in any case, the General Plan is being revised. (Br. Op. 5). In fact, TH-3 was planned precisely in accordance with the 1964 General Plan (See Plan map, reverse side), and the proposed revisions to the Plan do not make any significant changes to the population and growth statistics which demonstrate the necessity for the highway. (Pet. 8-9)

ute which they discuss from pages 12 through 19 of their Brief in Opposition but, curiously enough, do not bother to quote in its entirety. We rectify that omission by printing the NHPA in the Appendix to this brief. A review of the NHPA makes plain the fact that it does not control the present case. Whatever the power of the Secretary of Interior under the NHPA, a finding of local significance by the Secretary of the Interior does not trigger the coverage of Section 4(f).

The NHPA, enacted in 1966, provides for the maintenance of the National Register of Historic Places. The statute also establishes grants-in-aid to the states for historic preservation projects for properties on the Register and for the National Trust for Historic Preservation. Practically the entire text of NHPA is devoted to the procedure for making grants. See Sections 101, 102, 103, 104 and 105, pages 1a-6a, below. Other significant provisions of NHPA establish and make provision for an Advisory Council on Historic Preservation, which renders nonbinding advice to Federal agencies as to the historic merits of properties affected by Federal projects. See Sections 201, 202, 203, 204, and 205, pages 7a-11a, below.

The NHPA contains no particular procedure for the entry of places of purely "local" historical significance on the National Register of Historic Places. It neither expressly empowers the Secretary of the Interior to place such properties on the National Register in the face of a contrary decision from the local authorities, nor does it expressly forbid him to do so. It should be noted, additionally, that the NHPA does not authorize the Secretary of the Interior to declare a property "eligible" for the National

Register except in conjunction with enrolling a property on the Register after it has been nominated.

In an action which even the private respondents admit is unique (Br. Op. 12)—the Secretary of the Interior has on no other occasion declared a property to be of "local" historical significance against the views of the state and local authorities[4]—and "somewhat irregular" (Br. Op. 14), the Secretary of the Interior has declared the Valley to be eligible for the National Register because of his own finding, not concurred in by the local authorities, of its "local" historical significance. However, it is important to note that in fact the Valley has never actually been placed on the National Register. Thus, the question in this case is whether the declaration of eligibility for the National Register on the basis simply of the Secretary of the Interior's finding of "local" significance brought the Valley within the coverage of Section 4(f). (Pet. 3)

Section 4(f) was passed in the form at issue here in 1968, two years after the passage of NHPA. If Congress meant to include every location declared eligible for the National Register to be covered by Section 4(f), it would have been easy enough for Congress in passing Section 4(f) in 1968 to make an express reference to the NHPA. It did not. Rather, the NHPA contains its own provision requiring any Federally-funded project which might affect a property included on the National Register to consider the possibility of preserving the property. That procedure is set forth in Section 106 of NHPA (see page 6a, below), and there is no question but that the Section 106 procedures

[4] These authorities would have, of course, the incentive to nominate worthwhile sites since they would become eligible for the receipt of grants.

were followed here. If the interpretation of the private respondents is correct—namely, that every project eligible for the National Register is entitled to Section 4(f) protection, a protection much more stringent than that of Section 106—it is surprising that Congress did not repeal Section 106 of NHPA in 1968 when it passed Section 4(f), or at least declare it inapplicable to Federally-funded highway projects, since Section 106 would be mere surplusage as to all such highway projects.[5]

2. Thus, even if we assume the propriety of the Secretary of the Interior's action finding the Valley eligible for the National Register under NHPA on the basis of his finding of purely "local" historic significance, against the view of the competent state and local officials, it does not answer the question whether Section 4(f) is triggered. Section 4(f) contains a parallel construction in which it is contemplated that properties may have either local, state or national historic significance and that local, state and Federal officials will make these determinations. The black-letter rules of statutory construction say that words in such a statute must be read distributively and that a stat-

[5] It should be noted that even the law review article so heavily relied upon by the private respondents admits that after passage of Section 4(f), Section 106 of the National Historic Preservation Act still has significance. See Br. Op. 24, where the article is quoted as stating that "a National Register site is automatically entitled to protection under Section 106 of the National Historic Preservation Act." Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law & Contemp. Prob. 314, 318 (1972). If every property placed by the Secretary of the Interior on the National Register for whatever level of historical significance were entitled to Section 4(f)'s protection—which is the private respondents' position—there would be no basis for the article's statement that Section 106 would apply since the far greater protections of 4(f) would, under the private respondents' theory, be operative in each case.

ute of this sort means that the state and local authorities are to make determination as to state and local significance and the Federal authorities as to national significance. (Pet. 19-20) The various authorities are not entitled to fish in each other's ponds for Section 4(f) purposes. The private respondents, on the other hand, say that officials at any level can make a determination as to any level of historic significance; and such a determination would trigger Section 4(f). Yet the absurd consequence of this—which the respondents never discuss—is that the local officials could make a determination of national historic significance for the purposes of Section 4(f). (Pet. 17, 20).

The only other significant aid to statutory construction here, apart from the established rule of statutory construction just discussed, is the legislative history, which we quoted and analyzed at length in the Petition. (Pet. 20-24). That history is to the effect that the Secretary of Transportation's power of ultimate project review is the sole control over a local determination of no local historical significance. This is, of course, the approach of Section 106 of NHPA. That provision, as to a property included on the National Register, orders the head of the agency having jurisdiction to fund a Federal project affecting the property to "take into account the effect of the undertaking" on the historic property; there is no counterpart in Section 106 of the special finding that must be made when Section 4(f) has been triggered. Accordingly, Section 106 of the NHPA leaves the final determination to the agency whose project is involved. Section 4(f) does the same by vesting the review power over state and local determinations in the Secretary of Transportation, who has overall control of highway projects.

The legislative history is thus not consistent with a view that a veto power, subject only to the making of the Section 4(f) finding of "no feasible and prudent alternative," exists in the Secretary of the Interior through finding a property eligible for the National Register because of its local significance. As we have indicated above, that would suggest that Section 106 had been superseded as to highways affecting National Register properties. The legislative history thus clearly supports our view.[6]

There is thus literally no authority whatsoever for the proposition, necessary to the respondents' position, that Section 4(f) status may be triggered by any official, at whatever level, making a determination as to historic significance, at whatever level. Following the established rule of statutory construction here avoids the arrogant affront to the principles of Federalism urged by the private respondents who claim that for Section 4(f) purposes the Valley's local "significance has been established by the highest

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[6] Even the law review article relied upon by the private respondents (Br. Op. 20-21) does not support their arguments. *First*, the Valley is *not* on the National Register. The Secretary of the Interior purported to find that the Valley was "eligible" for listing but never placed the Valley on the Register. *Second*, even if the Valley were on the Register, the article argues only that the word "jurisdiction" in Section 4(f) refers "to more than merely political authority." And so it does; if the Secretary of the Interior found that a state-owned area had *national* historic significance and on this basis put it on the National Register, it is clear that it would be entitled to the protections of Section 4(f). The idea is that a Federal official has power to designate a site as having national significance, whether or not it is within his administrative or political jurisdiction, and a *local or state* historical society has power to designate properties as *local or state* landmarks even though, of course, an historical society would have no political or administrative jurisdiction whatsoever. The article's point is that the existence of political or general administrative jurisdiction is not the touchstone; rather the touchstone is the level of historic significance involved.

[*i.e.*, Federal] authority" and that the "opinion of the State of Hawaii Historic Review Board in no way affects this determination." (Br. Op. 19)

3. The Federal respondents' Brief in Opposition seeks to suggest, without quite saying, to this Court that the situation presented in this case—which admittedly never occurred before—cannot recur in the future. (Fed. Res. Br. Op. 7-9) In order to do this, the Federal respondents utterly confuse our position. The question is not whether the Secretary of the Interior may make a determination as to the eligibility of a property for the National Register "on his own motion." (Fed. Res. Br. Op. 7, 8 n. 5) The question is, rather, whether if he places a property on the Register (or finds it eligible for such placement), either on his own motion or not, on the basis simply of his own finding of "local" historical significance, that finding is significant for Section 4(f) purposes.

The Federal respondents admit (Fed. Res. Br. Op. 8 n. 6) that the Secretary of the Interior may still indicate the eligibility of properties for placement on the Register "at the behest of Federal agencies needing guidance." If at such a "behest" the Secretary places a property on the Register, or makes a determination of eligibility for such placement, purely on the basis of "local" historic significance, notwithstanding a contrary finding by the cognizant state and local bodies, the question presented by this case plainly will recur. The Federal respondents' suggestion that the issue of law presented by this case cannot recur is, accordingly, without foundation.

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The decision below as to the principal issue, the status of the Valley, is erroneous. For the reasons developed above (p. 8), there certainly can be no assurance that the issue will not recur. The Solicitor General, who doubtless conferred with the Interior Department during the development of his position, does not even seek to defend the decision below on its merits. It is not much a support for the majority's decision below to say that the situation in question never happened before and to give a lame reason why it may never happen again. The affront to federalism implicit in the divided result in the Court of Appeals warrants, we submit, this Court's review. And as the brief *amicus curiae* tendered by the State of Washington indicates, the erroneous holding below as to the petroglyph rock also raises a question of broad application in other cases.[7] (Pet. 24-25)

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[7] As that brief demonstrates, the question is not one of a factual determination—except to the extent that the Court of Appeals for the Ninth Circuit erroneously proceeded to make *de novo* factual findings—but involves an issue of law as to the proper standard of review.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Text of National Historic Preservation Act

[Public Law 89-665, October 15, 1966, as amended]

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

TITLE I

SEC. 101. (a) The Secretary of the Interior is authorized—

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture; and

(3) to establish a program of matching grant-in-aid to the National Trust for Historic Preservation in the United States, chartered by act of Congress approved October 26, 1949 (63 Stat. 927), as amended, for the purpose of carrying out the responsibilities of the National Trust.

(b) As used in this Act—

(1) The term "State" includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(2) The term "project" means programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure the preservation for public benefit of any such historical properties.

(3) The term "historic preservation" includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term "Secretary" means the Secretary of the Interior.

SEC. 102. (a) No grant may be made under this Act—

(1) unless application therefor is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897);

(3) for more than 50 percentum of the total cost involved, as determined by the Secretary and his determination shall be final;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (2) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States, in which case a grant to the National Trust may include funds for the maintenance, repair, and administration of the property in a manner satisfactory to the Secretary.

(c) No State shall be permitted to utilize the value of real property obtained before the date of approval of this Act in meeting the remaining cost of a project for which a grant is made under this Act.

SEC. 103. (a) The amounts appropriated and made available for grants to the States for comprehensive statewide historic surveys and plans under this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him: *Provided, however,* That the amount granted to any one State shall not exceed 50 per centum of the total cost of the comprehensive statewide historic survey and plan for that State, as determined by the Secretary.

(b) The amounts appropriated and made available for grants to the States for projects under this Act for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved statewide historic preservation plans.

The Secretary shall notify each State of its apportionment, and the amounts thereof shall be available thereafter for payment to such State for projects in accordance with the provisions of this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given, and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection.

SEC. 104. (a) No grant may be made by the Secretary for or on account of any survey or project under this Act with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any survey or project with respect to which assistance has been given or promised under this Act.

(b) In order to assure consistency in policies and actions under this Act with other related Federal programs and activities, and to assure coordination of the planning acquisition, and development assistance to States under this Act with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable, and such assistance may be provided only in accordance with such regulations.

SEC. 105. The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

SEC. 106. The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

SEC. 107. Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

SEC. 108. [Provision as to authorization of appropriations; omitted in this reproduction.]

TITLE II

SEC. 201. (a) There is established an Advisory Council on Historic Preservation (hereinafter referred to as the "Council") which shall be composed of twenty members as follows:

(1) The Secretary of the Interior.

(2) The Secretary of Housing and Urban Development.

(3) The Secretary of Commerce.

(4) The Administrator of the General Services Administration.

(5) The Secretary of the Treasury.

(6) The Attorney General.

(7) The Secretary of Agriculture.

(8) The Secretary of Transportation.

(9) The Secretary of the Smithsonian Institution; and

(10) The Chairman of the National Trust for Historic Preservation.

(11) Ten appointed by the President from outside the Federal Government. In making these appointments, the President shall give due consideration to the selection of officers of State and local governments and individuals who are significantly interested and experienced in the matters to be considered by the Council.

(b) Each member of the Council specified in paragraphs (1) through (10) of subsection (a) may designate another

officer of his department or agency to serve on the Council in his stead.

(c) Each member of the Council appointed under paragraph (11) of subsection (a) shall serve for a term of five years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of from one to five years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not less than one nor more than two of them will expire in any one year.

(d) A vacancy in the Council shall not affect its powers, but shall be filled in the same manner as the original appointment (and for the balance of the unexpired term).

(e) The Chairman of the Council shall be designated by the President.

(f) Eleven members of the Council shall constitute a quorum.

(g) The Council shall continue in existence until December 31, 1985.

SEC. 202. (a) The Council shall—

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation; and

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation.

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations.

SEC. 203. The Council is authorized to secure directly from any department, bureau, agency, board, commission, office, independent establishment or instrumentality of the executive branch of the Federal Government information, suggestions, estimates, and statistics for the purpose of this title; and each such department, bureau, agency, board, commission, office, independent establishment or instrumentality is authorized to furnish such information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

SEC. 204. The members of the Council specified in paragraphs (1) through (10) of section 201(a) shall serve without additional compensation. The members of the Council appointed under paragraph (11) of section 201(a) shall receive $100 per diem when engaged in the performance of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

SEC. 205. (a) The Director of the National Park Service or his designee shall be the Executive Director of the Council. Financial and admininstrative services (including those related to budgeting, accounting, financial reporting, personnel and procurement) shall be provided the Council by the Department of the Interior, for which payments shall be made in advance, or by reimbursement, from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the Secretary of the Interior: *Provided,* That the regulations of the Department of the Interior for the collection of indebtedness of personnel resulting from erroneous payments (5 U.S.C. 46e)* shall apply to the collection of erroneous payments made to or on behalf of a Council employee, and regulations of said Secretary for the administrative control of funds (31 U.S.C. 665 (g)) shall apply to appropriations of the Council: *And provided further,* That the Council shall not be required to prescribe such regulations.

(b) The Council shall have power to appoint and fix the compensation of such additional personnel as may be neces-

* Currently codified as 5 U.S.C. § 5514(b).

sary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949.*

(c) The Council may also procure, without regard to the civil service laws and the Classification Act of 1949, temporary and intermittent services to the same extent as is authorized for the executive departments by section 15 of the Administrative Expenses Act of 1946 (5 U.S.C. 55a),† but at rates not to exceed $50 per diem for individuals.

(d) The members of the Council specified in paragraphs (1) through (9) of section 201(a) shall provide the Council, on a reimbursable basis, with such facilities and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such facilities and services are requested by the Council and are otherwise available for that purpose. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties.

SEC. 206. (a) The participation of the United States as a member in the International Centre for the Study of the Preservation and Restoration of Cultural Property is hereby authorized.

(b) The Council shall recommend to the Secretary of State, after consultation with the Smithsonian Institution and other public and private organizations concerned with the technical problems of preservation, the members of the

* Currently codified as chapter 51 and subchapter III of chapter 53, 5 U.S.C.

† Currently codified as 5 U.S.C. § 3109.

official delegation which will participate in the activities of the Centre on behalf of the United States. The Secretary of State shall appoint the members of the official delegation from the persons recommended to him by the Council.

(c) [Provision as to authorization of appropriations; omitted in this reproduction.]